NO. 93-174

Supreme Court, U.S.
JUN 22 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSELYN I. STEWART

Petitioner

v.

ANTHONY M. FRANK, Postmaster General, U.S. Postal Service

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSELYN I. STEWART, PRO SE
821 Oak Hill Drive
Lexington, Kentucky 40505

4 PP

QUESTIONS PRESENTED

1. Whether the Trial Court erred in ruling that the Petitioner did not show just cause for delay in serving the U. S. Attorney, pursuant to Fed. R. Civ. P. 4(j) and 6.

2. Whether the Court of Appeals abused its discretion in denying the Petitioner's request for counsel.

LIST OF PARTIES

Joselyn I. Stewart,

Petitioner

Anthony M. Frank, Postmaster General, U. S. Postal Service,

Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States

Court of Appeals for the Sixth Circuit to review that Court's March 24, 1993, Order in this proceeding.

OPINIONS BELOW

The judgment of the Court of Appeals, which was not reported, is attached hereto. Also attached hereto is the judgment of the United States District Court for the Eastern District of Kentucky, entered July 10, 1992.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the District Court's final judgment in this case, pursuant to 28 U.S.C. Section 1291. The panel's order was entered on March 24, 1993. Consistent with this Honorable Court's

Rule 13, this Petition is timely filed.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(j)

Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Rule 6(b)

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the

expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

STATEMENT OF THE CASE

The Petitioner, Joselyn I. Stewart, brought this civil action against the Respondent, Anthony M. Frank, Postmaster General, U. S. Postal Service, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., on the basis of discrimination by her employer, because of her race (Black), resulting in a denial of promotion on two separate occasions. At the end of a two-day hearing before the EEOC Administrative Judge, a final decision was issued in favor of the U. S. Postal Service on November 6, 1990. According

to the findings of the Administrative Judge, the Petitioner was informed that a civil action could be filed in Federal District Court within thirty (30) days. On the thirtieth day following the opinion of the Administrative Judge, Petitioner sought and gained the assistance of Attorney Shirley Cunningham, who agreed to file an eleventh hour complaint in U. S. District Court for the Eastern District of Kentucky, in order to preserve the claim. On December 12, 1990, the Postmaster General was served by certified mail; however, no other parties were served in said action, unknown to the Petitioner. After the filing of the action,

Petitioner, pursuant to her agreement with Attorney Shirley Cunningham, sought the services of other counsel to help proceed with the civil action. IN late March, 1991, the services of Attorney T. Bruce Simpson were engaged. Shortly thereafter, an Agreed Order substituting counsel was submitted to the U. S. Attorney, Hon. Louis DeFalaise. Shortly thereafter, a Motion to Dismiss was filed, based on Fed. R. Civ. P. 4(j), claiming that the action should be dismissed for failure to effect service of process within 120 days of filing a complaint with the Court. In its original Order, dated June 27, 1991 ("Exhibit 2"), the Trial Court made a

clear finding that the Petitioner had shown good cause for not perfecting service on all parties. Further, the Court granted an extension of time to serve all proper parties. After said service, the litigation continued on its merits. However, in late Spring, 1992, the Defendant renewed its Motion for Summary Judgment based on the identical reasons, and, on June 12, 1992, the Trial Court, in its Order ("Exhibit 1"), ruled that good cause had not been shown, despite the fact that no additional evidence had been presented in the renewed Motion. Upon dismissal of the action, Attorney Simpson advised the Petitioner that he could no longer

represent her, and the appeal to the U. S. Court of Appeals for the Sixth Circuit was commenced pro se and a request for appointment of counsel was made. On March 24, 1993, the U. S. Court of Appeals issued an Order sustaining the action of the Trial Court and denying the Petitioner's request for appointment of counsel ("Exhibit 4"). This Order was issued as a mandate on April 15, 1993. It is from this Order and mandate that this Petition for a Writ of Certiorari to the U. S. Supreme Court is taken.

ARGUMENT I: THE COURT OF APPEALS COMMITTED ERROR IN SUSTAINING THE TRIAL COURT'S DISMISSAL.

Rule 4(j) of the Federal Rules of Civil Procedure provides that an action shall be dismissed for failure to effect service of process within 120 days of filing a complaint with the Court. However, the language of Rule 4(j) provides the plaintiff an opportunity to show good cause why service was not made within the 120 day limit. Further, the rule leaves to the discretion of the Court what good cause is. Additionally, where a plaintiff has made a reasonable effort to serve a defendant, Congress intended, in Rule 6(b), that the 120 day deadline be extended upon motion, even after expiration "where failure to act was the result of excusable neglect."

The opinion of the Court of Appeals was in error in that the spirit embodied in Rule 6(b) was totally overlooked, and the law was applied mechanically without due regard to the specific circumstances of the case which was in front of it. It was never disputed that the Postmaster received the summons and complaint within the 120 day limit -- only that the U. S. Attorney did not receive the summons and complaint. This was mere inadvertence and should not have been cause for dismissal, in that the U. S. Attorney was aware of the action, by his own admission, by January 18, 1991, clearly within the 120 day period of time.

Further, in Patterson v. Brady, 131

F.R.D. 679, 686 (S.D. Ind. 1990), the Court found good cause to allow the action to proceed, where the plaintiff served the Secretary of the Department of the Treasury, but failed to serve the Attorney General and the U. S. Attorney, because the Clerk's Office failed to appoint counsel timely to correct the deficiency of process, and plaintiff was not put on notice of the deficiency, and because there was no prejudice to the government since it knew of the litigation, the case was allowed to proceed. The Court held there that "the technical failure to serve the government's legal representatives is not as critical because the federal defendant

himself had been timely served." This is the same situation which appeared in this case; however, the Court of Appeals disregarded or misapplied the case law to these facts.

The most disturbing part of the current litigation is the fact that the Trial Court made the initial finding that there was good cause shown for the failure to serve the U. S. Attorney within the 120 day period of time; and, in its second opinion on June 12, 1992, without additional information being submitted, the Trial Court found that there was not good cause. This decision came after full-scale litigation had taken place, and monies and energy had

been expended on behalf of the Petitioner. This was a situation which was not specifically addressed by the Court of Appeals.

The Trial Court based its decision of June 27, 1991, on Ruley v. Nelson, 106 F.R.D. 514 (D.Nev. 1985). However, in its Order of June 12, 1992, the Court relied on Moncrief v. Stone, 961 F.2d 595 (6th Cir. 1992), which was decided April 13, 1992. Moncrief was decided after the District Court's original decision, and did not overrule Ruley; nor is it inconsistent. Petitioner submits to this Court that, if the District Court and Court of Appeals use case law that did not come into existence to reverse a

previous decision, then there will be no consistency in the law and no stability in past decisions. Also, the courts will be able to go back and change decisions which were based on good law, merely because the law has changed. This has the effect of legitimizing ex post facto laws.

ARGUMENT II: THE COURT ERRED IN DENYING THE REQUEST FOR APPOINTMENT OF COUNSEL.

During the process of appeal, the Petitioner made a request for appointment of counsel to assist her. However, said appointment was denied, in error.

During the course of litigation, Petitioner had expended a large sum of

money, and, when the matter came for appeal, most of Petitioner's financial resources had been depleted, which made it very difficult to obtain counsel to represent her. Because this matter, at this point, was an appeal, there was not an attorney who was willing to take the matter on a contingency basis, as suggested by the Respondent. This was due to the fact that the case, as an appealed case, had very little, if no, potential for monetary recovery. Thus, a large retainer was required. The denial of appointment of counsel was in error, because this Petitioner was not financially able to hire legal counsel for the following reasons:

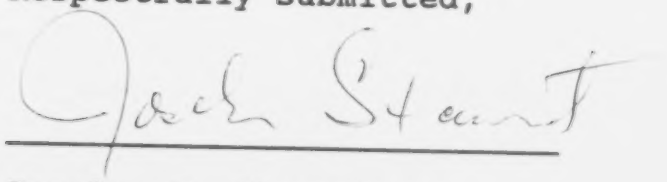
In November, 1989, Petitioner was injured on the job. She went to the doctor, but her condition only got worse. Eventually, in February of 1991, Petitioner was medically unable to work, which lasted until February of 1992. Upon returning to work, Petitioner was reinjured in April of 1992. This time, she was off work until October 13, 1992. During the periods of absence from her employment, Petitioner received substantially less money; however, her current living expenses continued at their preexisting rate. This caused Petitioner to go deeper into debt. Despite the fact that Petitioner had returned to her employment at the time of

the appeal, she had not -- and even today, has not -- made full financial recovery. Therefore, the Court of Appeals' denial of an appointment of counsel was in error.

CONCLUSION

For the above-stated reasons, the Petitioner requests the Court to grant this Petition for a Writ of Certiorari and overrule the opinion of the Court of Appeals.

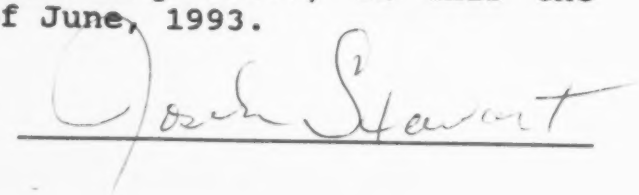
Respectfully submitted,



Joselyn I. Stewart
Petitioner, Pro Se
821 Oak Hill Drive
Lexington, Kentucky 40505

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Petition for a Writ of Certiorari was served by mailing same to Hon. John S. Osborn, III, Assistant U. S. Attorney, 110 West Vine Street, Suite 400, Lexington, Kentucky 40507, on this the 22 day of June, 1993.



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 90-554

JOSELYN I. STEWART, PLAINTIFF

V. MEMORANDUM OPINION AND ORDER

ANTHONY M. FRANK, POSTMASTER GEN.
U.S. POSTAL SERVICE DEFENDANT

* * * * * * * *

This matter is before the Court on the Defendant's Renewed Motion to Dismiss the Plaintiff's complaint. The Plaintiff has responded and the Defendant has replied to that response. The matter is now ripe for review by the Court.

In light of the recent decision of the United States Court of Appeals for

the Sixth Circuit in Moncrief v. Stone, No. 91-196 (April 13, 1992), the Court is of the opinion that the Motion of the Defendant must be granted and this action dismissed.

The record in the action sub judice indicates that the Plaintiff filed her complaint on December 6, 1990, alleging she had been subjected to racial discrimination as an employee of the United States Postal Service. She filed this action under 42 U.S.C. Section 1983 on the last date possible before the running of the 30 day statute of limitations.

On April 12, 1991, the Defendant moved for dismissal of the action on the

basis of the Plaintiff's failure to perfect service of process to the United States Attorney in a timely manner.

On June 14, 1991, summons issued via certified mail on U.S. Attorney General Richard Thornburgh and the United States Attorney's Office.

Rule 4(j) of the Federal Rules of Civil Procedure reads, in pertinent part, as follows:

> **Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such

party or upon motion.

Under Rule 4(d)(4) and (5), a plaintiff filing suit against the United States must deliver a copy of the summons and the complaint to the United States attorney for the district in which the action is brought. A plaintiff filing suit against an officer or agency of the United States must deliver a copy of the summons and complaint to the United States.

In Moncrief v. Stone, **supra**, the Sixth Circuit court considered whether the district court properly dismissed a Title VII action brought against the United States Department of the Army for failure of the plaintiff to serve the

United States attorney within 120 days of filing the complaint. The court concluded that the district court acted properly, holding that "Rule 4(j) compels the dismissal of the complaint unless good cause can be shown." Id. at 3.

> The Moncrief court further held: [W]e have held that "Rule 4(j) renders dismissal after 120 days mandatory rather than discretionary in the absence of good cause[.]"
>
> Although plaintiff does not frame his argument in precisely these terms, he is, in effect, arguing that the phrase "good cause" should be read expansively to include all cases in which a defendant is not prejudiced. We know of no court which has accepted this argument, and we decline to do so.

Id. at 4.

The Plaintiff herein attempts to distinguish her situation from that in

Moncrief by relying on Zankel v. United States, 921 F.2d 432 (2nd Cir. 1990), a Second Circuit case which created an exception to the 120-day service rule based on improper governmental conduct. IN Zankel, the plaintiff served the United States Attorney personally within 120 days but failed to properly serve the Attorney General. The Zankel court criticized the government, stating that "the government actually lulled plaintiffs into believing that their mailing to the Attorney General in April 1989 constituted satisfactory service."

Herein, the Defendant waited until 120 days had passed before filing a motion to dismiss. In effect, the

government waited until the motion was ripe before filing it. This can in on way be interpreted as bad faith on the part of the government.

Furthermore, the Plaintiff has made no argument as to her failure to perfect service. Quoting the case of Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304, 1306 (5th Cir. 1985), the Moncrief court stated:

> Without attempting a rigid or all-encompassing definition of "good cause," it would appear to require at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice. . . (emphasis in original).

As the Plaintiff has not even attempted to show good cause for her

failure to perfect service, the Moncrief opinion dictates that this action must be dismissed.

Therefore, IT IS HEREBY **ORDERED** that the Motion of the Defendant to Dismiss is **GRANTED**, that the pretrial and trial dates for this action are **SET ASIDE** and that this action is **DISMISSED AND STRICKEN** from the Court's docket.

This 12th day of June, 1992.

/s/ Karl S. Forester

KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 90-554

JOSELYN I. STEWART, PLAINTIFF.

V. ORDER

ANTHONY M. FRANK, ET AL. DEFENDANTS.

* * * * * * * * * *

This matter is before the court upon the motion of Defendant Anthony M. Frank, Postmaster General, to dismiss this action based upon failure to perfect service of process in a timely manner pursuant to Rule 4(j). The Plaintiff has filed a response objecting to the motion, and the parties have filed several additional memoranda addressing the issues. This court entered an order on

May 31, 1991 allowing the Plaintiff twenty days in which to perfect appropriate institutional service of process upon the United States in accordance with Rule 4(d).

Plaintiff initially served the Postmaster General, however, Plaintiff failed to serve the Attorney General of the United States and the United States Attorney for this district. Defendant now seeks dismissal of this action because Plaintiff failed to perfect service within 120 days as set forth in Rule 4(j). That rule provides that where service is not made upon the defendant within 120 days after the complaint is filed, the court shall dismiss the action

without prejudice, but only where the plaintiff cannot show good cause why service was not perfected within that time. If service is not effected within 120 days of the filing of the complaint, the plaintiff has the burden of establishing "good cause" for the delay. Ruley v. Nelson, 106 F.R.D. 514, 517 (D.Nev. 1985).

Although Plaintiff served the agency involved, Rule 4(d)(4) and (5) requires that Plaintiff also serve the United States Attorney for this district and the Attorney General of the United States. The court has reviewed the memoranda of the parties, including the affidavits of the attorneys and the client, and finds

that Plaintiff has shown "good cause" justifying retention of this action on the docket. The court chooses to exercise its discretion and not grant dismissal of this action. The Plaintiff initially served the Postmaster General. In order to further perfect service in accordance with the rules and with this court's order of May 31, 1991, the record reflects that Plaintiff has now served the Attorney General and the U.S. Attorney. Therefore, it is hereby ORDERED that Defendant's motion to dismiss is DENIED.

This 27th day of June, 1991.

/s/ Karl S. Forester

KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 90-554

JOSELYN I. STEWART, PLAINTIFF

V. **ORDER**

ANTHONY M. FRANK, POSTMASTER GENERAL, UNITED STATES
POSTAL SERVICE, DEFENDANT

* * * * * * * * *

This matter comes before the Court on the Motion of the Plaintiff to Alter, Amend or Vacate the Court's Memorandum Opinion of June 12, 1992, dismissing this action for failure of the Plaintiff to perfect service upon the United States Attorney's Office within 120 days as

required by Fed.R.Civ.P. 4(j). The Defendant has replied and the matter is now ripe for a ruling by the Court.

Relying upon the recent case of Moncrief v. Stone, No. 91-196 (6th Cir. April 13, 1992), the Court concluded in its June 12, 1992, Memorandum Opinion that this action must be dismissed. The Plaintiff now asserts that she had good cause for failing to perfect service and thus falls within an exception to Moncrief.

In fact, in an Order dated June 17, 1991, the Court did find that the Plaintiff had shown good cause for her failure to perfect service of process upon the U.S. Attorney's Office. This Order was premised upon the Plaintiff's memorandum pleading that she was uninformed by her first retained counsel that she needed to serve the U.S. Attorney's Office and that her second retained counsel did not notify her of the requirement until the time for service had expired.

However, as to a showing of good cause, the Moncrief opinion cites approvingly the language of the Fifth Circuit that a showing of "good cause. . . require[s] at **least** as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice." Id. at 4 (citation

omitted) (emphasis in original).

Here, the Plaintiff's showing of "good cause" can be characterized as no more than a combination of mistake of counsel and ignorance of the rules.

The Court is willing to recognize its own mistakes, but in this situation believes the mistake to have been the June, 1991, finding that the Plaintiff had shown good cause for the failure to perfect service. Under the Moncrief holding this is clearly not the case.

Therefore, to the extent that the Court's earlier opinion makes a finding that the Plaintiff did establish "good cause" for her failure to perfect service of process, it is set aside in light of Moncrief v. Stone, **supra**.

The Plaintiff's remaining arguments are a reiteration of the issues previously considered by the Court and the Court is of the opinion that the Memorandum Opinion of June 12, 1992, is valid and should remain.

Accordingly, IT IS HEREBY **ORDERED** that the Motion of the Plaintiff to Alter, Amend or Vacate the Memorandum Opinion of June 12, 1992, is **OVERRULED**.

This 10th day of July, 1992.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

No. 92-5967

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSELYN I. STEWART, Plaintiff-Appellant,	)	
v.	)	ORDER
ANTHONY M. FRANK, Postmaster General, U.S. Postal Service, Defendant-Appellee.	)	

BEFORE: KENNEDY, NORRIS and

SUHRHEINRICH, Circuit Judges.

Joselyn Stewart, a pro se litigant, appeals from an order of the district court dismissing her civil rights action filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq. This appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Stewart's complaint was dismissed when she failed to perfect service. Relying upon Moncrief v. Stone, 961 F.2d 595 (6th Cir. 1992), the district court concluded that Stewart's claim must be

dismissed as she had not shown good cause for her failure to perfect service. Upon consideration, we affirm the district court's dismissal of Stewart's action.

Federal Rule of Civil Procedure 4(d) prescribes the manner in which service must be made. When service is to be made upon an officer of the United States, as in this case, service is perfected "by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer. . ." Fed. R. Civ. P. 4(d)(5). Service is made upon the United States "by delivering a copy of the summons and of the complaint to the United States attorney for the district

in which the action is brought. . . and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States. . ." Fed. R. Civ. P. 4(d)(4). An action "shall be dismissed" if "service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period. . ." Fed. R. Civ. P. 4(j).

It is undisputed that Stewart did not serve the United States until after the 120-day time period had expired. We agree with the district court that

Stewart did not show good cause for her failure to perfect service. Therefore, "Rule 4(j) compels the dismissal of [Stewart's] complaint. . ." Moncrief, 961 F.2d at 596.

Accordingly, the order of the district court dismissing Stewart's complaint is affirmed, and her request for appointment of counsel is denied. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

CLERK